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RESPONSIBILITY OF NON-RESIDENT BANK DIRECTOR TO STOCKHOLDERS FOR LOSSES BY PRESIDENT'S USE OF BANK FUNDS.

The case of Wallach v. Billings, 115 N. E. 382, decided by Supreme Court of Illinois, holds that a long continued course of misconduct by the president of a bank in diverting its funds to his private enterprises, whereby losses ensued to the bank, gave no cause of action in favor of stockholders of the bank against a non-resident director.

The facts show that the defendant Billings had been continuously a director for several years; that during that period he had not attended any meetings of the board or passed upon local loans; that his being a director in another city was desirable for his general financial aid to the bank and that the transactions with the bank were correctly entered on its books. Thus it was that a casual examination would have revealed what was being done in the way of letting the president use bank funds.

There are some observations in the opinion to the effect that it "would be manifestly unjust under the facts to hold this non-resident director to the same degree of attention to the bank's affairs as the resident directors, whose duty it was to supervise the local loans and the management of the bank and who by their active connivance enabled Walsh to make the unlawful loans he did."

We greatly doubt whether stockholders competently could make any agreement for any director to neglect his duties as trustee. It would seem to be contrary to public policy for any agreement of this kind to be recognized. It involves a maze in fraud that is inconsistent with the character of title there is in stock ownership. This title greatly resembles that of ownership in a negotiable instrument. It passes from hand to hand with about the same facility as such paper, and with every change of ownership there is an implied warranty against fraud in the management of the corporation.

Furthermore, if the principle of estoppel could apply in such a case at all, its application might be confined to particular stockholders and not generally. Thus every stockholder has a general right to examine the books of a bank, but it is not necessarily his duty to make such examination. His right is in his own interest and he may waive it.

But if some stockholders are bound because they have expressly agreed that a director shall not perform his obligation under oath or because they know he is a non-resident and could not be expected to perform it, a court is put to it to unravel a tangled web in distinguishing between stockholders, when all of them equally may transfer their stock to innocent purchasers.

This director appears to have taken an oath annually for several years that: "He will, so far as the duties devolve upon him, diligently and honestly administer the affairs of such association," and the court in distinguishing him from resident directors holds there was an understanding that he should not be bound as other directors are. The court said further that: "It must be remembered that this is not a suit by depositors or creditors of the bank but by the stockholders—members of the corporation themselves. It is charged in the bill that Billings by the exercise of reasonable diligence could have ascertained the condition of affairs. Is not the same thing true of every one of the stock holders? For a period of seven or eight years the president of the bank was making illegal and hazardous loans. The facts charged in the bill as sufficient to have put Billings on in-

quiry would also have put the complainant stockholders on inquiry. The transactions of Walsh were in no way concealed from the complainants, and it appears from the arguments of counsel were a matter of general knowledge in the City of Chicago, where the complainants resided and where Billings did not reside. The liabilities as well as the rights of stockholders in banks and other corporations are well defined by law and have been rigidly enforced. They have something else to do besides drawing dividends."

It is true, that stockholders are not in as good a situation as depositors or other creditors might be. It is also true, we think, they are not in as deplorable a plight as directors are. If they are not, it is a case where courts will not regard all as being *in pari delicto*, and, if there is any policy to be subserved in holding a more guilty one to account, this will be done, not out of regard for the less guilty, but in the interest of that policy. Is there not a very potent, wise, useful policy to be subserved in saying, that a trustee shall be held to the strict terms of his oath in the management of an institution in which the public has an interest?

Take for example the knowledge of a guardian or trustee investing funds of a ward, shall that knowledge jeopardize the rights of *cestuis?* Take the approval of courts in the investment of funds. Shall deception by those who inform them go over their discretion and excuse one who, because of a bank being an institution under state supervision, has a private understanding with the trustee? Rather should he not be regarded as participating in the deception practiced?

The principle stated involves so many possible exceptions, that it seems to us the rule of policy should admit none of them, and the director should be held to the duty he swore to perform. At least, it does not appear in this case that he was inviegled into undertaking the duties by statute provided to be performed.

NOTES OF IMPORTANT DECISIONS.

COPYRIGHT — DRAMATIZATION FOR STAGE AND FOR MOTION PICTURES. Klein v. Beach, 239 Fed. 108, Second Circuit Court of Appeals, held that the grant of the sole and exclusive right to dramatize a book "for presentation on the stage" did not prevent the author from selling the right to another to make a scenario and to present same in a motion picture performance.

The court admits that it has been held that dramatic rights include motion picture rights, as was decided in Kalem Co. v. Harper, 222 U. S. 55. It says: "If used alone, that is doubtless true, especially if the contract antedate the commercial use of motion pictures."

The real question in this case was, whether there was "a negative covenant against destroying the effect of such a grant by motion pictures."

It was said: "There is no intimation that (plaintiff in injunction) should have further rights to make, not a play, but a motion picture scenario. Such a scenario is hardly a 'play' for 'presentation on the stage.' We have this language to construe at a time when the different requirements of 'screen' and 'stage' were well understood and with them the need of uniting two separate kinds of dramatization. We see no reason in the face of that situation to suppose that the language was used out of its natural meaning, or is in disregard of a well-established convention which was applicable."

It appears to us, that the objecting grantee of the right to dramatize for the stage did have the right to object to his rights being seriously impaired and that producing a motion picture of a play should be regarded as greatly interfering with the success of a play. In Herbert v. Shanley Co., 37 Sup. Ct. 232, 84 Cent. L. J. 191, it was held that a copyright of a musical composition was infringed by a performance in a hotel dining room. The court said there was "no need to construe the statute so narrowly."

WORKMEN'S COMPENSATION ACT—APPLICATION TO INTERSTATE CARRIER IN ITS INTRASTATE BUSINESS.—Whatever else the Workmen's Compensation Act may have effected or failed to effect, one thing is certain, that is that such a ruling as that made in Wabash R. Co. v. Hayes, 234 U. S. 86, 79 Cent. L. J. 37, cannot apply in suits in states, where it has been adopted. That case held that a declaration stating a good cause of action under the federal Employers' Liability Act may afford a basis for recovery under state law by striking

out all allegations as to injury occurring in interstate commerce not sustained by proof.

In Raymond v. Chicago, etc., R. Co., 37 Sup. Ct. 268, it is held that, where suit was brought under the federal act and the proof showed the injury sued for did not occur to an employe then engaged in interstate commerce, there was no jurisdiction to bear the cause, because of the provisions of the Washington Workmen's Compensation Act on the same day held by the court to be constitutional. In this case judgment was entered for defendant on the pleadings. In states where the common law remedy could be applied to an amendment, it would have been allowed according to the Hayes case. Therefore, in states having Workmen's Compensation Acts, there is more of peril, or may be, in resort to the federal act, than where it does not obtain—especially if there is a limitation in time for proceedings to be begun.

Also, in the Raymond case it was said: "It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law according to the provisions of the Workmen's Compensation Act. * * * And this result is controlling, even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce, since it also has this day been decided that that fact does not prevent the operation of a state Workmen's Compensation Act (New York C. R. Co. v. White, 243 U. S. —, 37 Sup. Ct. 247)."

A careful reading of the opinion in the White case reveals only the fact that the employer was engaged in interstate commerce, but there is no specific ruling, as above stated. It possibly was presented in the brief, or in assignments of error, but was not noticed in the opinion.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF JUDGMENT OBTAINED AFTER FINAL SETTLEMENT.—The recent Missouri case of State, ex. rel. v. Holtcamp, 266 Mo. 347, 181 S. W. 1007, raises a very perplexing question and produces unfortunate results, which possibly only a statute can properly correct.

The proceeding was by writ of mandamus to compel the probate court of St. Louis to allow, as a valid claim against an estate already finally settled, a judgment obtained in the circuit court subsequent to the order of final settlement.

In this case suit upon the claim was not filed in the probate court, as occurs in most cases, but was begun direct in the circuit court, but within the time allowed for the presentation of claims against an estate. No notice was served upon the administrator, however, except that involved in the ordinary service of summons. The case in the circuit court dragged its weary length along, surviving two reversals in the supreme court, and finally terminating in a judgment for plaintiff. When this judgment was then presented to the probate court for allowance, that court held that it had no jurisdiction to allow the claim, having over six years before accepted a final settlement of the estate and discharged the executrix without knowledge that there was pending in any other court a suit or a demand against the said estate.

It seems to be well settled in Missouri and some other states having similar administration statutes, that the circuit or district courts of general jurisdiction have concurrent jurisdiction with probate courts of all claims against the estates of deceased persons and that formal notice of claims litigated in the circuit court need not be given to the executor nor presented for allowance to the probate court until final judgment. Wernse v. McPike, 100 Mo. 487; Stephens v. Bernays, 119 Mo. 146; McCoy v. Jackson, 21 Ark. 472; O'Donnell v. Herman, 42 Ia. 60; Hurley v. Shuford, 11 Ala. 203; Ellison v. Allen, 8 Fla. 206; Kathman v. Skaggs, 29 Kans. 5.

On the other hand, the probate court is given exclusive jurisdiction to appoint, remove and finally discharge executors and administrators. The question, therefore, arises, what is the effect of a final settlement of an estate and the discharge of an executor before the final termination of a suit against the executor in the circuit court?

The court in the Holtcamp case held that the probate court may be compelled by mandamus to reopen the administration six years after final settlement and distribution of the assets, and allow the judgment as a valid claim against the estate. The court held that the order approving the final settlement was without legal effect in view of the outstanding claim still in litigation in the circuit court, saying: "We are of the opinion that a probate court is without the jurisdictional power to approve a final settlement so long as in fact demands are legally pending and undisposed of in either the probate court or other courts of record, and there are available assets for their satisfaction."

The justice of the decision so far as the claimant is concerned is apparent. So long as she was permitted by law to choose either of two tribunals in which to present her claims, she should not be deprived of her rights by the unfavorable action of the other. And it may also be admitted that the circuit court could not be divested of its jurisdiction to proceed to final judgment against the executrix by the probate court's discharge of the defendant as the personal representative of the estate on final settlement. The defendant herself would be estopped to deny her liability to pay the claim.

But if the estate itself can be reopened years after final settlement and other claims allowed without an appeal from the order of the probate court or other proceeding directly brought to set aside the order, what becomes of the finality of a discharge in the probate court, and what protection is afforded to innocent third parties dealing with the property of the estate on the assumption that all liabilities of the former owner are properly discharged?

PSYCHOLOGY AND EVIDENCE.

Psychology, the books tell us, is the science of the mind; but in discussing this subject from the standpoint of the practicing attorney rather than the professional psychologist, it seems to me that psychology, however abstruse some professors would have it appear, is in its best and most practical sense nothing more or less than a study of human nature, a science of human behavior.

Not only is it necessary for the attorney to be able to size up men, but he also has the greatest opportunity to exercise his faculties in this direction. Judges and lawyers, hosts of them, are keen psychologists in their analysis of human nature and its varied expression.

Take for instance, Lincoln. It was his deep understanding of the fundamental instincts of human nature that enabled him as a young country lawyer to handle his first murder case with such masterly skill. Lincoln having first determined that his client was not guilty, knew that the principal witness on whom the state relied, was lying when he testified that he saw the defendant Crayson shoot and kill Lockwood at ten o'clock at night by moonlight. Lincoln knew that the story was manufactured for a purpose, and that purpose he was bound to discover and did discover in his own original manner, when he produced an almanac showing that the moon on the night in question was unseen, and did not rise until one the next morning. Lincoln knew that this false witness could not fabricate testimony that would fit all the natural requirements of truth, so he watched for the weak spot in the manufactured falsehood, found and exposed it. As Lincoln said at the time, "Nothing *but a motive to clear himself* could have induced him to swear away so falsely the life of one who never did him harm!" Lincoln was indeed a reader of men.

Going back to biblical times, Solomon, when he was called upon by the two harlots to determine which one was the mother of the disputed baby, exhibited that keen insight into human character that later distinguished Lincoln. "The living child is mine, the dead one thine," said one. "No," said the other, "the dead child is thine, and the living mine." The case hung thus even; no more evidence on one side than on the other. But Solomon found a means whereby to turn the scales, to untie the hard knot, and to discover the hidden truth. He understood human nature and knew it would respond under emotional strain. He knew that real mother love would respond differently from mere pretensions of the same thing. He knew that the true mother would sacrifice everything to save the life of her offspring; but that the false mother was in the attitude of one in a game to win at any cost.

Daniel is another example. In defending the virtuous Susanna who was charged with adultery, by utilizing the familiar method of separating witnesses Daniel knew that by so doing the two priests who testified that they had caught poor Susanna in the

act, would contradict themselves in some important particular unless they had rehearsed their parts well beforehand. And so they did tell a different story, one testifying that the offense occurred under an elm tree, and the other, under a palm tree in an opposite side of the garden. And like Lincoln, Daniel discovered their motive for testifying falsely. Because Susanna would not allow them to violate her chastity the priests sought revenge.

Not only were these three great advocates learned in the law, but they also possessed an acquired grasp of the psychologic situation. They had acquired a rich and varied experience in the manifold actions and deeds which go to make up the various types of human personality. They were habituated to a close observation of human behavior, and their long training and experience made them experts in this field.

There have been numbers of other jurists and attorneys who have had rich and deep knowledge of human nature gained from wide experience, and much excellent psychology is to be found in their decisions, charges and examinations. But formerly the knowledge of these men was not recognized, not done up in convenient packages, so to speak. But the vague experiments of the past, those that have stood the test of time, have gradually been assuming a scientific aspect. The knowledge of psychology has been organized, standardized, and classified, and it is possible for one to acquire many of its principles from text books, thus sparing himself the numerous costly errors which was the price his predecessors had to pay to make possible the science he now inherits.

The lawyer of to-day can profit by the arduous labors of at least two generations of scientists who have devoted their lifetime to the accurate study of human behavior, the results of which have been boiled down and enunciated in text books and monographs, enabling him to learn by reasonable study and application what it took others a life time to discover.

All law is psychological. It is a human product drawn up to direct and control human conduct. The trail of the human is over every inch of it. The very atmosphere of the court room is psychological. There they are, the judge and jury, the plaintiff and defendant, their lawyers and witnesses, all human beings with imperfect sense organs, imperfect powers of observation, memory and reasoning, with passions base and noble, prejudices, interests, viewpoints, connections and affiliations, kinks and peculiarities; their personalities, temperaments, habits; their religious, social and political beliefs and feelings, and heaven knows what else,—a perfect welter of psychological stuff.[1]

The contact between psychology and the law is at no point more close and obvious than in the matter of testimony and the utilization of testimony for determining questions of fact.

It is the duty of the lawyer in every case he tries to seek "the truth, the whole truth, and nothing but the truth," no matter how darkly it may be obscured; but lawyers are familiar with the fact that this is not an easy matter. There are two sides to every lawsuit, two parties contending for the truth of the matter as testified to by each. The case must be won or beaten is the attitude of each party to the controversy. For either counsel it is a question of which party can develop the true facts on his side, or rather whether the opposite side either is not giving the truth, is withholding some of it, or is unduly coloring the facts. That either or all of these things are current in testimony may be admitted. The object then of cross-examination is, if possible, to discover what is the truth, what are the real facts; and it is therefore profitable and desirable, among other things, that the various psychological defects of any particular witness be brought to light.

As applied to testimonial evidence psychology deals chiefly with the attention, observation, perception, memory and other such traits of the witness.

(1) Morse on The Value of Psychology to the Lawyer.

Amidst the multitude of persons who have formed impressions and think that they "know" something about the subject in hand, close observation shows that many have formed their beliefs without any basis of perception safe enough to be worth considering in a court of justice.

The numberless errors in perceptions derived from the senses, the faults of memory, the far-reaching differences in human beings as regards sex, nature, culture, mood of the moment, health, passionate excitement, environment, all these things had so great an effect that we scarcely ever receive two quite similar accounts of one thing; and between what people really experience and what they confidently assert, we find error heaped upon error. The closing of the eyes and the belief that what is stated in evidence has really been observed, are the characteristics of so many witnesses that absolutely unbiased testimony can hardly be imagined.

The fallibility of testimony was clearly and forcibly demonstrated by Prof. Wm. A. McKeever, now of Kansas University, in an interesting experiment before a class of psychology students. Professor McKeever has already related before this association the details of his experiment; how "it was arranged that at a given moment, without any warning to the members of the class, three men should burst into the room and go through the movements of a hold-up."

Referring to this exciting episode, Professor McKeever states that:

"In an actual criminal trial the testimony would perhaps be most unfair and damaging in the case of (one of the participants) Smith. Although entirely unarmed and inoffensive in his statements, yet three witnesses testified that he carried a revolver, snapped it several times at Jones, or that he cried, "Stop, or I'll shoot!" White on the other hand, who carried a revolver minus the cylinder, was little noticed."

And as Ram advises in his treatise on Facts:

"It is so with all testimony; and hence, whatever depends upon the senses or the memory of the witness, however honest and truth-speaking he may be in intention, is fairly open to doubt, to question, to investigation, and to denial, for the purpose of showing that it ought not be relied upon. And that it may have, on the question under consideration, a bearing altogether different from that which it was employed by the party who adduced it."

It therefore behooves the lawyer who wishes to excel in trial work, to make a closer study of not only the rules of human conduct and behavior, but also the inner workings of the mind and senses.

A person placed on the stand to testify regarding matters that have come under his notice is in a distinctly interesting situation psychologically. One who is a witness to an occurrence probably does not realize that he will later be called upon to testify. Consequently his observation of many material points is purely incidental and not attentional and attentive. Needless to say the attention constitutes one of the main conditions which influence a witness in his ability not only to observe what happened at the time of an occurrence, but subsequently to reproduce an accurate account of it. After the event has transpired the matter in controversy becomes a subject of special interest to the advocate. But before the existence of the case there was doubtless no such cause to excite the witness. As a result we seldom come in contact with the ideal witness who has observed all was to observe, all the details; though we find many who claim to have done so.

Several months may intervene between an event and the testifying concerning it in court. By that time some of the details have become blurred and faded; the memory suffers, and the mind is compelled to fill in the gaps as best it can. Sometimes it more than compensates for the loss by the unconscious use of imaginative filling.

In the recent trial of Oscar McDaniel, charged with murdering his wife, the prosecuting attorney made a great ado over the

accused's conflicting testimony as to the number of shots that were fired on the night Mrs. McDaniel was killed. A few minutes after he found his wife's body, McDaniel in telling about his pistol fight with the alleged assassin, said there were nine shots fired. Later he testified that there were only seven shots. Other witnessses said they heard only five. Now considering how common are the many defects of addition and how playful the imagination is during intense excitement, it is more reasonable to conclude that McDaniel told the truth and was honestly mistaken. than that he deliberately falsified.

Much might be said concerning the suggestibility of the witness, both at the time he observes an occurrence and later when he testifies about it, but this subject is too broad to admit of detailed discussion in this paper. A witness is liable to be unconsciously open to suggestion even when he is fighting against that very thing; and in this connection it is interesting to note the case of a German spy who was recently detained in England while attempting to return to his own country. The man was disguised as a South American. He had a genius for make-up, and looked like a Latin. Furthermore, he talked like one. But the official who examined the prisoner had reason to believe that he was a German, so he questioned him in that language and tried every conceivable way to trap him but without success. The man always answered in Spanish, and insisted that he was a South American merchant on a peaceful commercial enterprise. From all indications he didn't know a word of German. As a last resort, the examiner suddenly shouted, "Achtung!" the German word for "Attention." Like lightning, the spy's heels clicked together; his chin came up, and his hands straightened at his sides. He. tried with a convulsive effort to check these involuntary movements, but it was too late. He was a German reservist, and a military command was one thing to which his whole nature had to respond.

From time to time certain agitating psychologists, notably the late Professor Munsterberg, of Harvard, have berated the legal profession for not adopting psychology, and applying it forthwith to the law and the administration of justice. These pedagogues censure the bar for not making the professional psychologist an officer of the court; we are criticised for not utilizing their experimental psychology for the determination of testimonial certitude. They would have us believe that there is some miraculous psychological process of extracting the truth from a witness; as though truth could be swept into the head like so much gold into a sack. All this despite the fact that the leading psychologists admit that these vague, experimental schemes have not yet proven a success, and do not work out in actual practice.

Professor Munsterberg even went so far as to suggest the use of scientific instruments for the determination of guilt or innocence but he was compelled to admit that such a method does not give sufficient hold for the discrimination of the guilty conscience and the emotional excitement of the innocent.

Is it small wonder then that the legal profession has refused to sponsor such embryonic and premature innovations?

I am inclined to agree with Prof. Josiah Morse of the University of South Carolina, that:

"Psychology can hardly hope to become an exact and applied science in the sense and to the extent that chemistry, physics, botany, and geology have become such, for the reason that human beings are not so obligingly simple, uniform and fixed as bolts and screws, liquids and gases, or even microbes and corpuscles. . . .

Of course human beings are fundamentally alike in that they are human. . . . But what is true of one human being is needless to say, by no means true of all; nor can a general psychological law be applied to all indifferently, as if they were so many blocks of wood or stone. The application must be individual, i. e., different for each case, and the differences are sc

complex and subtle, and the whole matter made more involved by the fact that each individual posseses a will of his own, which means he can accept or reject, obey or disobey, as suits himself, and not the psychologist, that it is a long time distant before the psychologist will stand to the lawyer in a relation similar to that in which the chemist stands to the manufacturer, the physicist and engineer to the builder, (or) the bacteriologist to the physician. . . ."

But this is far from saying that the lawyer has nothing to learn from psychology. Notwithstanding the fact that this science has been overestimated by a few zealous pedagogues far beyond its practical utility, and has been denounced by the conservative lawyer as being unpractical and visionary, a study of this mental science will reward the trial lawyer; for it will assist him to ascertain as nearly as is possible the actual facts; and will enable him to discover and better analyze, to emphasize or suppress, as the case may be, the numerous psychological defects of the witness.

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BILLS AND NOTES—ALTERATION.

METROPOLITAN NAT. BANK v. VANDERPOOL.

Court of Civil Appeals of Texas. Amarillo. Jan. 31, 1917. Rehearing Denied March 7, 1917.

192 S. W. 589.

Alteration of note by striking out a clause not destroying its negotiability may be a material alteration, destroying it as a note in the hands of a holder for value and without notice.

HUFF, C. J. The appellant bank brought this suit against appellee, Vanderpool, upon the following note and indorsement:

"$768.00. Minneapolis, Minn., June 29, 1914.

"One year after date I promise to pay to the order of the O. W. Kerr Company seven hundred sixty-eight and no/100 dollars at the office of the O. W. Kerr Company, Minneapolis, Minn., with interest after date at the rate of six per cent per annum until fully paid, value received. Interest payable annually. Deferred payments of interest to draw same rate as principal sum.

"——— Payment on Contract No. L ———.

"F. W. Vanderpool.

"Plainview, Texas.

"The O. W. Kerr Co.,

"Per P. W. Endsley, Atty. in Fact.

"For value received I hereby waive protest, demand, and notice of protest on within obligation, and guarantee payment thereof at maturity or any time thereafter.

"The O. W. Kerr Co.,

"Per P. W. Endsley, Attorney in Fact."

The appellee answered and alleged material alteration of the note after its delivery and execution to the O. W. Kerr Company. The alteration consisted in erasing the contract number, which was part of the note at the time of its execution, and referred to a certain contract made between the appellee and the O. W. Kerr Company, and that the alteration was made without the knowledge or consent of appellee. The original number of the note when executed was "Contract No. L 854," and that since that time the No. 854 had been erased, without the knowledge, consent, or authority of appellee. It is further alleged that the O. W. Kerr Company sold to appellee a certain 320 acres of land situated in Alberta, Canada, by a contract in writing, in which the company agreed to convey good title in consideration of $5,440, $500 thereof was paid in cash; the balance of the consideration was evidenced by six promissory notes executed by appellee, and that the note sued on was a renewal of the last of the notes, all the others having been paid off and discharged. It is alleged that the O. W. Kerr Company could not and would not deliver title to the appellee for the land, all of which appellant knew and had notice, and that the note had been altered as above set out, and for the purpose of destroying the appellee's right to plead failure of consideration, or such other defense as he might justly be entitled to, and in order that the holder of the note might claim that he was such without notice of the contract to which it referred.

The trial court submitted one issue to the jury:

"Was this note altered by erasure of the figures 854 since its execution and delivery without defendant's authority?"

The jury answered:

"We, the jury, find for the defendant, believing the figures 854 were erased from note after execution without consent of the defendant."

The trial court rendered judgment for the defendant under this verdict, and recites in the judgment entry that he found that the

erasure was a material alteration, and also that there was a total failure of consideration for the note.

The appellant presents in this court three assignments of error: (1) To the action of the court in overruling exceptions 1, 2 and 3. Because the alteration is not shown by the answer to be material; (2) in submitting the issue of alteration because if there was an alteration the evidence shows it was not material; (3) In rendering judgment because the alteration was not material and because the appellant was a purchaser in due course of business for value without notice, and before maturity. Under these assignments appellant presents two propositions: (1) The negotiability of the note is not affected by mere reference to a contract which is the consideration for the note, where it is not thereby burdened with the conditions of the contract, and therefore the erasure of such reference cannot constitute a material alteration; (2) if the reference was sufficient to give notice to the contents of the contract and its execution, there is no evidence that it was breached before the note was indorsed, and that the appellant had knowledge of the breach, and that it was therefore entitled to recover as an innocent purchaser.

If the erasure was material the note sued on was not appellee's obligation. "The general rule is that any alteration which is material and made without the consent of the party sought to be charged thereon at any time after its execution renders it void as to them, even in the hands of an innocent holder." R. C. L. vol. 3, Bills & Notes, § 214. "Where an instrument has been materially altered it cannot be sued upon in its altered form nor read in evidence to support an action, even when brought by a bona fide holder without notice, and even though the alteration has been so skillfully made as to escape detection upon close scrutiny. But when the party making the alteration discharges the burden of proof upon him by showing that the material alteration was made by mistake and without fraudulent intent, the right of action upon the consideration for which it was given remains." 2 Dan. on Neg. Insts. § 1413; Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56; Landon v. Holcomb, 184 S. W. 1098; Spencer v. Tripplett, 184 S. W. 712.

The appellant, except inferentially, does not present a proposition that the court erred in holding the alteration material. True, it is asserted, because the reference to the contract did not destroy its negotiability, therefore the erasure was immaterial. The negotiability of the note before and after the erasure is not the only issue to be determined, but, is the erasure so material as to destroy the identity of the obligation or its legal effect, and to make a new contract for appellee? If it is, the alteration is material. "Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports or to its force as a matter of evidence, when made by any party to the contract, is an alteration thereof, unless all other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not." 2 Dan. on Neg. Insts., § 1373; 2 C. J. § 6. "Alteration of Instruments;" Ford v. First National Bank, 34 S. W. 684; Baldwin v. Haskell National Bank, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178; Barton v. Stephenson, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346.

The legal effect of the recital in this note, which was part of the note, was to make it a payment upon a certain designated contract. The erasure of the number of the contract on which it was payment was, in effect, to make it a payment on a different contract and to alter the ultimate responsibility on that contract of which it was a payment. It was no longer evidence of a payment on the contract for which it was given, but was made to evidence the payment on a different one. This altered appellee's undertaking. The erasure caused it to appear that it was executed upon consideration of one contract when the consideration was for a different one. If appellee had demanded of the payee in the note a fee simple title to the land, which contract L 854 obligated it to convey, and presented the note as his right thereto, the note would not, as altered, evidence his right to such title. 2 Dan. on Neg. Insts., § 1394; Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1131; Kalteyer v. Mitchell, 110 S. W. 462; American Copying Co. v. Thompson, 110 S. W. 777; Goldman v. Blum, 58 Tex. 630; Pope v. Taliaferro, 51 Tex. Civ. App. 217, 115 S. W. 309.

The true test as to materiality of the alteration is whether it is the same contract. Measured by this test, we believe it must be determined in this case that the altered contract is different. It is the payment on a contract as altered which appellee did not agree to make and which would affect his rights very ma-

terially in the contract he had with the O. W. Kerr Company, which was executed at the same time and as part of the same transaction. Whether the alteration in the note would materially affect the contract of sale may be a question upon which the courts are not in entire accord, and which perhaps would not defeat the enforcement of their contract but in order to do so, appellee would be required aliunde the note, to prove he had made the payment which was made a condition precedent to a conveyance of the legal title to the land. Edward Thompson Co. v. Baldwin, 62 Neb. 530, 87 N. W. 307. But we believe these two instruments, being part of the same transaction, may be examined together, for the purpose of determining the materiality of the alteration and the effect it may have upon the obligation and the consideration. The alteration, as made, would appear to increase appellee's obligation, destroy the identity of the original obligation, and evidence a different consideration. This erasure was not a mere memorandum on the note, but was part of the obligation agreed to between the parties and written in the fact of the note.

We believe the trial court correctly held that the alteration was material. The judgment is affirmed.

NOTE.—*Fraudulent Alteration of Memorandum or Statement in Nature of Memorandum on Note.*—In the case of Barton Savings Bank & T. Co. v. Stephenson, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346, cited by instant case, it is laid down that: "Any alteration which may in any event alter the rights, duties or obligations of the party sought to be charged is material in the legal sense." The case concerned a change of date in a note. It seems, therefore, to have little of appositeness to the question before the court. And so in the other cases cited at this part of the opinion. Erasing the contract number was destroying a memorandum and not changing in any way the note or any rights thereunder.

McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567, shows an alteration fraudulent in character by the holder, by changing so as to make the note payable to "holder" instead of "order" and words were added so as to show a retention of a lien on land. The original holders sued on the note. There is nothing in this case except imposing a penalty on him, who for his advantage fraudulently alters a promissory note and then sues on it.

But an alteration or erasure of something on the face of a note must be so as to affect the operation of the terms of the note. Thus where a memorandum on the back of a note stated that after a certain day the interest would be less than that stated in the body of the note, which memorandum was placed there by agreement between the maker and the holder, this was held not a material alteration so far as the surety was concerned. Bank v. Hyde, 131 Mass. 77.

In Glass Co. v. Matthews, 89 Fed. 828, 32 C. C. A. 364, a slip of paper was pasted on a note treating of additional machines to be shipped to licensee. This was not an alteration affecting the terms of the note itself.

In Shaeffer v. Jackson, 155 N. W. 108, 135 N. W. 622, adding the name of a subsequent purchaser to a mortgage note was taken as a mere memorandum.

In Palmer v. Largent, 5 Neb. 223, it was held that removal of the words that "this note is given upon condition" affects it in no way, no condition being stated.

So tearing off a memorandum of a privilege after the time it could be exercised is not a material alteration. Mater v. Am. Nat. Bank, 8 Colo. App. 325, 46 Pac. 221.

Where a paper on which a note was written on the same sheet of paper as an application for insurance, detaching the latter offered no defense to a suit in the note. Humphreys v. Crave, 5 Cal. 173; Vandervoort v. Ins. Co., 49 Ill. App. 457; Comer v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Bank v. Mack, 335 Ore. 122, 57 Pac. 326.

Where last indorser of accommodation bill makes memorandum at foot of paper directing how proceeds are to be credited, this is no part proper of the paper and removal thereof is of no materiality. Hubbard v. Williamson, 27 N. C. 397.

Insertion of number of policy on premium note, and there is no question left as to identity of note, the removal of that number is no material alteration. Hipp v. Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319.

If there is a change made in the serial numbers of bonds, this is immaterial, because the liability represented by the instrument is in no way affected. Wylie v. Mo. P. R. Co., 41 Fed. 623; Morgan v. U. S., 113 U. S. 476, 5 Sup. Ct. 588, 28 L. Ed. 1044; Elizabeth v. Force, 29 N. J. Eq. 587.

If alteration has no influence on the statute of limitations or upon proof of execution, adding the name of a subscribing witness is immaterial alteration. Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

In the instant case there was nothing elided so as to change in any respect the duties of the signer and at most the number was a mere reference or a memorandum the same as had it have been placed on the back of the note.

It is true, that the act of the holder in striking the number of the contract to which the note referred may have made it more difficult to the signer to show payment on that contract. This, however, was solely a personal matter between payee and signer and related in no way to the essence of the latter's obligation. It concerned evidence and nothing more. Otherwise the note went to the world as an unconditional contract in writing and this number neither added to nor detracted therefrom.

C.

ITEMS OF PROFESSIONAL INTEREST.

SPECIAL ANNOUNCEMENTS OF THE AMERICAN BAR ASSOCIATION MEETING.

ANNUAL MEETING.—The annual meeting of the American Bar Asociation will be held at Saratoga Springs, New York, on Tuesday, Wednesday and Thursday, September 4, 5, 6, 1917.

Headquarters will be at the Grand Union Hotel.

The offices of the secretary and treasurer will be located in the Grand Union Hotel. The offices will be open for registration of members and delegates, and for sale of dinner tickets on Monday morning, September 3, at 10 o'clock.

The business sessions of the association will be held and the formal addresses before it will be delivered in The Saratoga Casino.

First Session: TUESDAY, SEPTEMBER 4, 10 A. M.

Address of welcome by Edgar T. Brackett, Saratoga Springs.

George Sutherland, of Utah, President of the Association, will deliver the President's address.

Second Session: TUESDAY, SEPTEMBER 4, 8 P. M.

Thomas W. Hardwick, of Georgia, United States Senator, will deliver an address, "The Interstate Commerce Clause of the Constitution of the United States."

RECEPTION.

A reception will be given by the New York State Bar Association to the President and members and guests of the American Bar Association and ladies accompanying them, on Tuesday, September 4, at 9:30 p. m., in the Ball Room, Grand Union Hotel.

Third Session: WEDNESDAY, SEPTEMBER 5, 10 A. M.

The reports of standing and special committees will be presented and discussed. They will be printed in the July number of The American Bar Association Journal.

EXCURSION.

There will be a steamer excursion of two hours on Lake George, Wednesday afternoon, September 5, for members and guests of the Association and ladies acompanying them. Excursionists will leave Saratoga by train for Fort William Henry Hotel, the place of embarkation.

Fourth Session: WEDNESDAY, SEPTEMBER 5, 8 P. M.

Charles E. Hughes, of New York, will deliver an address.

Fifth Session: THURSDAY, SEPTEMBER 6, 10 A.M.

William H. Burges, of Texas, will deliver an address.

Reports of committees not previously disposed of will be presented and discussed.

Sixth Session: THURSDAY, SEPTEMBER 6, 2:30 P. M.

Unfinished business.

ANNUAL DINNER.

The annual dinner of the Association will be given in the Ball Room of the Grand Union Hotel, on Thursday, September 6, 7 p. m.

COMMITTEES, AFFILIATED BODIES, ETC.

The National Conference of Commissioners on Uniform State Laws will convene on Wednesday, August 29, 11 a. m., in the Appellate Division Room, Town Hall.

The sessions of the Conference will continue on Thursday, Friday, Saturday and Monday, August 30, 31, September 1 and 3.

The Executive Committee of the Conference will meet on Wednesday, August 29, 10 a. m., in the Appellate Division Room, Town Hall.

A Special Conference of Representatives of Bar Associations will meet on Monday, September 3. There will be three sessions of the Conference, 10 a. m., 2 p. m. and 8 p. m., respectively.

The morning and afternoon sessions will be held in the Ball Room, Grand Union Hotel, and the evening session in The Saratoga Casino.

It is the purpose of the Committee in charge of the program for this Conference to invite thereto three delegates from each State Bar Association and two delegates from each Local Bar Association.

The Section of Legal Education will hold its sessions in the Court of Appeals Room, Convention Hall. There will be two sessions of the Section on Monday, September 3, 10:30 a. m. and 8 p. m. A third session will be held on Tuesday, September 4, 2:30 p. m.

The Comparative Law Bureau will hold its session on Monday, September 3, 2 p. m., in the Appellate Division Room, Town Hall.

The American Institute of Criminal Law and Criminology will meet in the Court of Appeals Room, Convention Hall, Monday, September 3, 2 p. m. A second session will be held Monday, 8:30 p. m., in the Town Hall, and a third session Tuesday, September 4, 2 p. m., also in the Town Hall.

The Section of American Society of Military Law will meet Tuesday, September 4, 3 p. m.,

in the Ordinary, adjoining the Ball Room, Grand Union Hotel.

The Executive Committee of the Association will meet on Monday, September 3, 9 p. m., in Room No. 212, Grand Union Hotel.

The General Council of the Association will meet in the Court of Appeals Room, Convention Hall.

The first meeting of the Council will be held on Tuesday, September 4, 9 a. m.

The Judicial Section will hold its session on Tuesday, September 4, 2 p. m., in the Ball Room, Grand Union Hotel.

There will be an informal dinner for all members of the Section, and officers, members of the Executive Committee and former presidents of the American Bar Association, on Monady evening, September 3, 7 o'clock, in the Ball Room, Grand Union Hotel.

The Section of Patent, Trade-Mark and Copyright Law will meet on Tuesday, September 4, 3 p. m., in The Saratoga Casino (second floor).

CORRESPONDENCE

TRADE-MARK AND TRADE-NAME — BOTTLING PRODUCT SOLD IN BULK.

Editor, Central Law Journal:

Your issue of March 30th, 1917, Volume 84, No. 13, page 228, carries a criticism of the case of The Coca Cola Co. v. Bennett, and your criticism of that decision is of great interest to me, inasmuch as I prepared the brief in that case. I am taking the liberty of sending you under separate cover a copy of that brief.

Criticisms of a decision are always interesting, and your article is most interesting, but I take it that you would not mind if I call your attention to a few matters that evidently escaped your attention.

In the first place, your comparison between the trade-mark right and patent right is not proper. If the trade-marked product had been resold as such, then and in that event there could not have been any complaint in the use of the trade-mark. However, in the case under discussion, carbonated water was added to the syrup, and this was placed in a sealed package with the trade-mark thereon. In other words, the substance was changed. If a trade-mark means anything, it means that it is the guarantee of the person producing the product. If anyone would have a right to change the product and then use that guarantee, would it not be substituting the guarantee of one person for another?

Again, if anyone would have a right to use the trade-mark under discussion, would it not be within the power of anyone to destroy that trade-mark? A trade-mark is nothing but a symbol of good will. As for example: Suppose instead of putting up Coca Cola in the proper proportion, one should simply use a drop of the Coca Cola syrup, and mix it with eight ounces of water, the good will connected with that product would be at once destroyed, and unless the position is correct that the owner of a trade-mark can control that trade-mark, what recourse in the above illustration would the owner have?

I particularly call your attention to the case of Person v. Van Neck, on page 34 of the brief.

Your next criticism is that Coca Cola is sold at the fountain, and at the fountain it is mixed with carbonated water. I think a careful understanding of what happens will show that your criticism is not well-founded. At the fountain, the Coca Cola syrup is mixed in the presence of the purchaser. The purchaser realizes in that event that the guarantee of the Coca Cola Company can go no further than its syrup. In the case of bottles, it is not mixed in the presence of the consumer, but comes in a sealed package with the name Coca Cola thereon. The guarantee, therefore, from the trade-mark is that the product in that package is pure and unadulterated. I think there is a difference between the sale in bottles and at fountains.

The whole question narrows itself to one proposition. Has a manufacturer any control over his trade-mark? It must be admitted as a part of the law of unfair competition, that a manufacturer has a right to prevent the adulteration of his product. Does it not follow from this that he has a right to say who shall change the form of his product?

Very truly yours,

HAROLD HIRSCH.

Atlanta, Ga.

NOTE—The criticism made by us was rather arguendo than positive, and the stress was rather on inconsistency of manufacturer in allowing retailers at fountains to mingle the syrup with water to make a beverage and saying that no bottler but one specially authorized could do the same thing. We think it may be true that the manufacturer can say, "I recog-

nize no beverage as entitled to trade-mark protection but by those specially authorized by me to make a beverage out of my trade-marked syrup. I claim no trade-mark on the beverage itself, but I allow my trade-mark for syrup to be on an authorized beverage containing the syrup." We refer readers to our criticism and the above letter from the trade-mark owner's attorney. Possibly our vision might be clarified and fortified by recourse to a duly authorized bottle or a duly authorized soda fountain, the latter being any soda fountain. We remember that some Georgia lawyer is reported to have said that a drink before breakfast was like a *scire facias*—it revived his judgment.—EDITOR.

BOOKS RECEIVED.

The Psychology of Special Abilities and Disabilities. By Augusta F. Bronner, Ph. D., Assistant Director, Juvenile Psychopatic Institute, Chicago. Price, $1.75. Boston. Little, Brown & Company. 1917.

The Statute Law of Municipal Corporations in Massachusetts. With Historical Introductions Tracing the Development of the Law From its Beginning in Every Department of Municipal Government. By Frederick Huntley Magison of the Essex Bar, and Thomas Tracy Bouve. Price, $10.50. Albany, N. Y. Matthew Bender & Co. 1917. Review will follow.

The Law of Eminent Domain. A Treatise on the Principles Which Affect the Taking of Property for the Public Use. By Philip Nichols; formerly Assistant Corporation Counsel of the City of Boston: author of "The Law of Land Damages in Massachusetts," the "Power of Eminent Domain," and "Taxation in Massachusetts." In two volumes. Price, $15.00. Albany, N. Y. Matthew Bender & Company. 1917. Review will follow.

A Desk Book of 25,000 Words Frequently Mispronounced. Embracing English Words, Foreign Terms, Bible Names, Personal Names, Geographical Names and Proper Names of all kinds current in Literature, Science and the Arts, that are of Difficult Pronunciation. Carefully Pronounced, Annotated, and Concisely Defined, and indicating the preferences of the leading dictionaries from 1732 to 1916. By Frank H. Vizetelly, Litt.D., LL.D. Price, $1.60. Funk & Wagnalls Company. New York. 1917. Review will follow.

HUMOR OF THE LAW.

"The defendant admits," said the traffic squad cop, "that he went around the corner on two wheels."

"Fifty dollars fine or 30 days," said the judge.

"But does Your Honor know," interposed the defendant's counsel, "that the defendant was riding a bicycle?"

An individual called Lije Williams was haled into court to answer a complaint arising out of a broken bargain. Among the witnesses called was one Steve Collins.

"Mr. Collins," said the examining lawyer, "you know the defendant in this case, do you not?"

"Oh, yes, answered Collins.

"What is his reputation for veracity?" continued the lawyer. "Is he regarded as a man who never tells the truth?"

"Waal, I can't say that he don't never tell the truth," replied Steve, "but I do know that if he wanted his hogs to come to dinner he'd have to git somebody else to call 'em!"

When Governor Head was in office in New Hampshire, Colonel Barrett, of the governor's staff, died, and there was an unseemly scramble for the office, even while his body was awaiting burial with military honors. One candidate ventured to call upon Governor Head.

"Governor," he asked, "do you think you would have any objections if I were to get into Colonel Barrett's place?"

The answer came promptly. "No, I don't think I should have any objections, if the undertaker is willing."

I read with interest in the November-December Docket of the mortgaged "part Jersey cow with horns and all other household goods," and the further contribution re the Wafford chattel mortgage to Clemens describing "one dark bay horse named Fred, with white face, three white stocking feet, and one spring wagon."

Permit me to add one further oddity of description, appearing in a chattel mortgage of record in this county. This mortgage, after describing cows, horses, machinery, wagons, etc., continues as follows: "Together with all other stock and increase from all stock, tools and machinery on the farm," etc. It is submitted that the "increase" is well covered and that a cross between well-bred Jersey cow and a corn binder might easily be expected to yield "another freak of nature."—The Docket.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adverse Possession**—Evidence.—An occasional securing of firewood and removing a fence from a tract does not establish adverse possession of it.—Snow v. Bray, Ala., 72 So. 542.

2. **Assignments**—Sufficiency.—An instrument addressed to tenant, saying, "Kindly pay J. the rent due January 15, 1915, amounting to $15.00," and signed by the landlord, prior to the giving of which the assignee had been telephoned by the tenant that he would pay on such order, is a sufficient assignment.—Morris v. Leach, Ore., 162 Pac. 253.

3. **Attorney and Client**—Client's Confidence.—Where the claimed originator of a banking scheme employed defendant, an attorney to organize and exploit it, but the project failed, the attorney's acts in forming a new company in his own interests held not a violation of his client's confidence.—Stein v. Morris, Va., 91 S. E. 177.

4.——Evidence.—In action by attorneys for agreed compensation, it was proper to exclude defendant's answer to a question designed to elicit that he had secured other counsel because of plaintiff's hostile attitude, where there was no evidence by defendants showing they were embarrassed by any act of plaintiffs.—Snow v. Beard, Ore., 162 Pac. 258.

5. **Bankruptcy**—Foreign Judgment.—In action on foreign judgment wherein defendant set up his discharge in bankruptcy in bar, he was not required to show that claim sued on was provable in bankruptcy proceedings, nor that the debt was not excepted from the operation of the discharge.—Halligan v. Dowell, Ia., 161 N. W. 177.

6.——Jurisdiction.—The federal District Court may not entertain jurisdiction of bill or cross-bill, where allegations to impress a trust on property of bankrupts in administration in another district constitute an attempt to secure priority of payment out of bankrupts' estate, because of moneys fraudulently obtained by the bankrupts.—Knauth, Nachod & Kuhne v. Latham & Co., U. S. S. C., 37 Sup. Ct. 139.

7.——Preference. — No preferential transfer under the Bankr. Act July 1, 1898, § 60b, as amended by Act Feb. 5, 1903, § 13, and Act June 25, 1910, § 11, results from a mortgage securing notes representing advances to take up notes of the bankrupt, which bank claimed bore forged indorsements, though the mortgagee knew the mortgagor was insolvent.—Dean v. Davis, U. S. S. C., 37 Sup. Ct. 130.

8. **Broker**—Written Contract.—A contract to furnish the name and address of a proposed buyer for a commission on the purchase price is a contract for the employment of a "broker," which is required to be in writing by Civ. Code, § 1624, subd. 6.—Cram v. McNeil, Cal., 162 Pac. 140.

9. **Carriers of Goods**—Connecting Carrier.—Railroad contracting to carry cotton to port, and to deliver to ocean carrier, was not liable for ocean carrier's failure to transport, where road delivered it on pier where steamship was loading, in ample time for loading.—Louisville and M. R. Co. v. Williams, Ala., 73 So. 348.

10.——Perishable Freight.—Where a shipper of perishable freight shows that damage occurred while goods were in carrier's possession, a prima facie case is made out, and burden of showing that damage was not caused by its negligence is upon carrier.—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., Minn., 161 N. W. 145.

11. **Carriers of Live Stock**—Delay.—Where cattle were not shipped for immediate sale on the market, the measure of damage from injury and delay is the difference between their market price as delivered and what their market price would have been had they been properly cared for and handled during transportation.—Panhandle & S. F. Ry. Co. v. Morrison, Tex., 191 S. W. 138.

12.——Estoppel.—Under provision in contract for shipment of live stock at reduced rate that shipper should not claim any damage in excess of actual value of the stock at time and place of shipment, or in excess of $3 per head, shipper who had realized more than $3 per head was not estopped to claim damages less than that valuation.—Baird v. Denver & R. G. R. Co., Utah, 162 Pac. 79.

13.——Limited Liability.—It is immaterial that shipper of a jack under limited liability contract did not know of his choice of rates under contract for unlimited liability.—Scullin v. Eoff, Ark., 191 S. W. 31.

14. **Carriers of Passengers**—Baggage.—Three rings and lavalliere, contained in a suitable hand bag or mode of carriage, were articles of "baggage" of a woman passenger.—Borden v. New York Cent. R. Co., N. Y. City, 162 N. Y. Supp., 1099.

15.——Destination.—A passenger wrongfully carried past her destination to which she returned, cannot recover for injuries received while going from the depot at destination to her mother's home, although she paid her own passage back to destination.—Central of Georgia Ry. Co. v. Burnitz, Ala., 73 So. 471.

16.——Intoxication.—It is only when passenger is helplessly intoxicated, or incapable of protecting himself, and his condition is, or by ordinary care could be, known by trainmen, that they are required to give him any extra care.—Louisville & N. R. Co. v. Mudd's Adm'x, Ky., 191 S. W. 102.

17.——Joint Station.—Passenger holding a ticket over road running out of a joint station, who by misdirection takes wrong train, can ride thereon to reasonably safe and convenient point from which he can reach his proper train, and his ejection at such point is proper.—Mobile & O. R. Co. v. Dill, Ky., 191 S. W. 80.

18.——Negligence.—Where negro passengers could occupy only rear half of street car, and it and platform were overcrowded, so that front trucks jumped the track, it was not a passenger's duty to see that car was properly balanced, but the conductor's.—Landix v. New Orleans Ry. & Light Co., La., 73 So. 668.

19. **Charities**—Uncertainty. — Charitable devise to certain named curates was not made too uncertain because an individual curate might die or be removed; as, the trust being imposed upon them in their official capacity, whoever filled office when distribution was made was trustee empowered to act.—Beidler v. Dehner, Ia., 161 N. W. 32.

20. **Commerce**—Federal Employers' Liability Act.—A machinist's helper, making repairs on an engine used for intrastate and interstate traffic, held not employed in interstate commerce within federal Employers' Liability Act, April 22, 1908.—Minneapolis & St. L. R. Co. v. Winters, U. S. S. C., 37 Sup. Ct. 170.

21.——Intoxicating Liquor.—The possession of two quarts of whisky by an interstate passenger carried for his private use, and not in excess of what is reasonably necessary for his personal use and comfort while on the journey, is protected by the commerce clause of the Constitution.—Howard v. State, Ala., 73 So. 559.

22.——Intoxicating Liquor.—Congress did not exceed its power under commerce clause in enacting provision of Webb-Kenyon Act, March 1, 1913, forbidding interstate shipment of liquor intended to be received or sold or used in violation of any law of the state into which it is transported.—James Clark Distilling Co. v. Western Maryland R. Co., U. S. S. C., 37 Sup. Ct. 180.

23.——Mental Anguish.—Permitting the recovery of damages for mental anguish caused by failure to deliver an interstate telegram is not an arbitrary burden on interstate commerce, or an unreasonable interference with such commerce.—Western Union Telegraph Co. v. Martin, Tex., 191 S. W. 192.

24.——Police Regulation.—In an action under the federal Employers' Liability Act, all state laws in matters with which it deals are superseded, and St. 1911, p. 910, § 2, relating to hours of labor of minors, although not conflicting with federal act, could not be given effect even as a state police regulation.—Smithson v. Atchison, T. & S. F. Ry. Co., Cal., 162 Pac. 111.

25. **Common Carriers**—Ostensible Authority.—Secret limitations upon the authority of a railroad's general agent do not exempt the railroad from the obligations of engagements made by him within his ostensible authority as to telegraph transportation to a person on a connecting railway line.—Southern Ry. Co. v. Rowe, Ala., 73 So. 634.

26. **Compromise and Settlement**—Fraud. — Failure of husband and his sons to state to wife, who could not understand English or read or write in any language, facts regarding contents or nature of deeds and agreements of settlement of litigation and property rights which they induced her to sign, would constitute fraud.—Hill v. Victora, Ia., 161 N. W. 72.

27. **Conspiracy**—Labor Union.—An agreement stipulating that one named labor union, so long as it was able to do it, should have all the work of a particular employer, was within the limitation of allowable competition and legal.—Tracey v. Osborne, Mass., 114 N. E. 959.

28. **Constitutional Law**—Billboards.—Prohibition of billboards over certain dimensions where buildings on both sides of street are used for residence purposes without consent of majority of owners does not deny to corporation engaged in outdoor advertising equal protection of the laws given by Const. Amend. 14.—Thomas Cusack Co. v. City of Chicago, U. S. S. C., 37 Sup. Ct. 190.

29.——Class Legislation.—Chapter 45, Laws 1915, limiting women's work hours, is unconstitutional, as applying to restaurants, as class legislation under Const. U. S. Amend. 14.—State v. Le Barron, Wyo., 162 Pac. 265.

30. **Contempt**—Attorney. — Accused attorney, by circulating in court pamphlet derogatory to presiding judge, was guilty of contempt of court.—In re Willis, Wash., 162 Pac. 38.

31.——Explanation.—If language of publication is not libelous per se as to court, party charged with contempt in using it by sworn answer may explain language by showing that it was used in sense not libelous, without intent to impugn court, or interfere with its proceedings, and such answer must be taken as conclusive.—Ray v. State, Ind., 114 N. E. 866.

32. **Corporation**—Stockholder.—A corporation, when sued by the heir of one shown by its books to have been the holder of stock, transferable by indorsement of the certificate, can defend the action in the interest of the real owner, though his identity may be unknown to it, if it has evidence that the stock has been sold.—Green v. Galveston City Co., Tex., 191 S. W. 182.

33.——Transfer of Stock.—The general rule is that one entitled to transfer of stock may re-

cover damages against corporation where it improperly refuses to register the transfer.—Eisenhauer v. New Orleans Cotton Exchange, La., 73 So. 685.

34. **Damages**—Instructions.—Where plaintiff was in hospital three weeks, and for six weeks was unable to devote full time to business, although no evidence that the business was affected, instruction that jury might consider "any loss of time heretofore sustained by plaintiff from his work as result of his injuries" was not erroneous, where other elements of damage were correctly stated.—Virginia Ry. & Power Co. v. Hill, Va., 91 S. E. 194.

35. **Death**—Children.—The word "children," as used in Rev. Civ. Code, art. 2315, as amended by Act No. 120 of 1908, giving a right of action for damages for death, does not include grandchildren or more remote descendants.—Hunt v. New Orleans Ry. & Light Co., La., 73 So. 667.

36.——Evidence.—In action for wrongful death, under Homicide Act (Code, § 2486), where death is alleged to have been caused by collision between defendant's automobile and motorcycle, conduct of drivers of motorcycles with one of whom deceased was riding may be taken into consideration in determining character of offense, and assessing punishment by way of damages.—Karpeles v. City Ice Delivery Co., Ala., 73 So. 642.

37. **Dedication**—Estoppel.—A city may be equitably estopped by the acts of its officers from asserting its rights to a dedicated street where there has been inequitable conduct on the part of the city and irreparable injury to parties in good faith acting in reliance thereon.—City of Superior v. Northwestern Fuel Co., Wis., 161 N. W. 9.

38.——Statutory.—A dedication of the extension of a platted street across lands not platted, noted on the plat, but not signed and acknowledged by the owner and accompanied by no map, is not a statutory dedication.—Lais v. City of Silverton, Ore., 162 Pac. 251.

39. **Deeds**—Consideration.—Widow of son of deceased owner of realty who sold her interest in estate for inadequate consideration because she neglected to learn its value could not set aside transaction for mere inadequacy of consideration.—Nichols v. Roach, Ill., 114 N. E. 914.

40.——Duress.—Deception by a husband in inducing his wife to sign a deed, by false statements as to threats made against him by his creditors, is not duress which he and she may set up to invalidate the deed as against such creditors.—Burnett v. Continental State Bank of Alto, Tex., 191 S. W. 172.

41. **Divorce**—Desertion.—A written agreement between a husband and wife after the desertion by the wife, whereby the parties mutually agree to live separate from each other, shows a consent to the desertion during the time the agreement remained in force.—Silva v. Silva, Cal., 162 Pac. 142.

42. **Fixtures**—Removal.—Fixtures annexed to realty by a tenant may be removed by the tenant during the term, but if, without having removed them, he voluntarily quits the premises at the expiration of his term without any agreement with the landlord, he cannot afterwards claim them as against the owner of the land.—Noyes v. Gagnon, Mass., 114 N. E. 949.

43. **Frauds, Statute of**—Memorandum.—Where defendant gave plaintiff written authority to sell farm containing a partially incorrect description, and plaintiff later purchased farm himself, taking a receipt for initial payment, signed by defendant, describing the farm and referring to the authority to sell, this was sufficient memoranda within statute of frauds. Rev. St. 1909 § 2783.—Meek v. Hurst, Mo., 191 S. W. 68.

44. **Gas**—Evidence.—Where the servant of a gas company turned on the gas at the wrong stop box and escaping gas entered an adjoining building and exploded, the gas company is prima facie liable for glass destroyed by the explosion.—Maryland Casualty Co. v. Cherryvale Gas, Light & Power Co., Kan., 162 Pac. 313.

45. **Highways**—Negligence per se.—Independent of statute it is negligence as a matter of law to drive a motor car on a dark night at such speed that it cannot be stopped within the distance that objects can be seen ahead.—Fisher v. O'Brien, Kan., 162 Pac. 317.

46.——Automobile.—An automobile light does not light the road for a reasonable distance unless it is illuminated for the distance required for stopping the vehicle.—Fisher v. O'Brien, Kan., 162 Pac. 317.

47. **Husband and Wife**—Community Property.—A creditor of the community of acquets and gains, holding a judgment against the community, may proceed against a surviving husband as the head of the community and as representative of the succession of the deceased wife by seizure and sale as well after as before the death of the wife.—Simpson v. Bulkley, La., 73 So. 691.

48.——Fraud.—That a grantor in contemplation of marriage had no other intention than to secure grantee against financial losses from loans or advances, and executed his conveyance in good faith immediately preceding his marriage, did not vitiate it as a fraud on her rights.—Lewis v. Davis, Ala., 73 So. 419.

49. **Insurance**—Forfeiture.—The forfeiture clause for nonpayment of "any premium" in life policy, where application being a part of contract provided that insurance should not take effect "unless and until" first payment was made, applied to initial premium.—Norris v. New England Mut. Life Ins. Co., Ala., 73 So. 377.

50.——Agency.—Local lodge, chartered by Supreme Lodge of the World, Loyal Order of Moose, and whose ritualistic ceremonies, including initiation of candidates, was prescribed by Supreme Lodge, held to act as an agent of Supreme Order in initiation of candidates making the Supreme Order liable for personal injuries to a candidate.—Supreme Lodge of World, Loyal Order of Moose v. Kenny, Ala., 73 So. 519.

51.——Custom.—If it was the custom of a fraternal order that medical examiner's acceptance was treated as an acceptance by insurer, such custom was binding.—Supreme Lodge, K. P. v. Graham, Ind., 114 N. E. 879.

52.——Fraud.—In action on insurance policy, defense that it was void because of fraud prac-

ticed by insured, may be pleaded without repaying or offering to repay premiums received by insurer.—Columbian Nat. Life Ins. Co. v. Mulkey, Ga., 91 S. E. 106.

53.——Insolvency.—Insolvency of insurer entitles policy holders to return premiums on the "pro rata," instead of the "short rate," basis.—Johnson v. Button, Va., 91 S. E. 151.

54.——Murder.—If assured's adversary was guilty of unjustifiable homicide in killing assured, the latter's death is not within the exception of a policy against death while violating the law, but if the circumstances rendered the killing justifiable, there was a violation of law within the exception.—American Nat. Life Ins. Co. v. White, Ark., 191 S. W. 25.

55.——Subrogation.—An insurer of property may pay a loss without disputing whether it falls within the terms of the policy, and thereby become subrogated to all the rights of the policy holder to recover from the wrongdoer.—Maryland Casualty Co. v. Cherryvale Gas, Light & Power Co., Kan., 162 Pac. 313.

56. **Landlord and Tenant**—Abandonment.—Where tenants under an oral lease notified landlord of their abandonment of contract before taking possession of premises and landlord elected to keep contract alive and hold tenants to their obligations, she necessarily kept it alive for all purposes, and her own unperformed obligations to make repairs remained in effect.—Wise v. Sparks, Ala., 73 So. 394.

57. **Libel and Slander**—Privilege.—While it is privilege of a newspaper publisher to print a fair statement of course of a judicial or other public proceedings, it is not within his privilege to print a severe personal criticism made by a prosecutor against attorney for an accused out of court.—Viosca v. Landfried, La., 73 So. 698.

58. **Malicious Prosecution**—Probable Cause.—Where one charged with misdemeanor admits his guilt and pays a fine to the deputy marshal in the presence of the mayor pro tem., which is turned into the town treasury, filing of a charge against the deputy marshal, equivalent to that of robbery, will afford basis for an action for malicious prosecution.—Terral v. Stovall, La., 73 So. 669.

59. **Marriage**—Validity.—Where a woman having a living husband married another, the second marriage is void, and she acquired no property rights by virtue thereof, and on the death of such other her grantee has no right as against the heirs of deceased.—Curlew v. Jones, Ga., 91 S. E. 115.

60. **Master and Servant**—Employers' Liability Act.—A "jack pole" and wire cable used to hold a coal mining machine in position were parts of the "plant" of the coal mining company, within the Employers' Liability Act.—Tennessee Coal, Iron & R. Co. v. Wiggins, Ala., 73 So. 516.

61.——Estoppel.—Where an employer by his answer raises question of duration and extent of employe's incapacity, and offers evidence, he cannot contend there was no dispute between the parties within the Workmen's Compensation Act, when action was begun.—Sillix v. Armour & Co., Kan., 162 Pac. 278.

62.——Evidence.—In proceedings for compensation to surviving wife of deceased employe, where only evidence as to existence and relationship of claimant consisted of so-called protocol taken in Austria without notice to defendant and certified by a probate judge in such country, the award of compensation was not supported by competent evidence.—Lobuzek v. American Car & Foundry Co., Mich., 161 N. W. 139.

63.——Negligence.—Where defendant had delegated to its foreman the duty of sorting brass for melting, and the foreman, knowing the danger of melting certain brass balls without opening, directed plaintiff to melt them, plaintiff being injured in resulting explosion, the defendant is responsible for its foreman's negligence.—Jeez v. A. Y. McDonald Mfg. Co., Ia., 161 N. W. 62.

64.——Safe Working Place.—The duty of a master to furnish his servants with a safe place of work does not apply to a building which they were engaged in constructing, where safety depends on due performance of work by the servants, and their fellow-servants.—Byrd v. Thompson, Ga., 91 S. E. 100

65.——Sudden Death.—Where the evidence showed that the deceased workman had for 21 years been in perfect physical condition, it is the reasonable presumption that his sudden death while at work was due to external efficient agency.—Bloomington, D. & C. R. Co. v. Industrial Board of Ill., Ill., 114 N. E. 939.

66.——Total Incapacity.—The phrase, "total incapacity for work," as used in Workmen's Compensation Act, does not imply an absolute disability to perform any kind of labor, but a person disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as "totally incapacitated."—Moore v. Peet Bros. Mfg. Co., Kan., 162 Pac. 295.

67.——Workmen's Compensation Act.—Under Workmen's Compensation Act the employer's liability to pay compensation arises from the law rather than from any agreement of the parties.—North Alaska Salmon Co. v. Pillsbury, Cal., 162 Pac. 93.

68.——Workmen's Compensation Act.—Liability imposed by Workmen's Compensation Act has no connection with negligence of employer or employe, and an injury arising out of and in the course of employment creates liability without any question of fault on part of either.—Decatur Ry. & Light Co. v. Industrial Board of Illinois, Ill., 114 N. E. 915.

69. **Municipal Corporation**—Assessments.—Where landowner inclosed a tract for cemetery purposes, leaving a strip 16 feet wide outside the inclosure and adjoining a public street, such strip may be assessed for sidewalk improvements.—Northern Light Lodge, No. 156, I. O. O. F. of Iowa v. Town of Monona, Ia., 161 N. W. 78.

78.——Billboards.—An ordinance passed under authority of law to regulate maintenance of billboards is valid exercise of police power.—Thomas Cusack Co. v. City of Chicago, U. S. S. C., 37 Sup. Ct. 190.

71.——Estoppel. Where a property owner fails to object while street improvements beneficial to his property are being made, knowing that his property will be assessed therefor, assessments thereafter levied for such work will not be enjoined.—City of Ardmore v. Appollos, Okla., 162 Pac. 211.

72.——Law of Road.—Under ordinance requiring vehicles when turning to left from one street into another to keep to right of center of intersection, where one side of street was so obstructed as to be impracticable for use in ordinary travel, a vehicle was required only to keep to right of center of intersection of two currents of travel as defined and determined for practicable purposes by customary use of street.—Karpeles v. City Ice Delivery Co., Ala., 73 So. 642.

73.——Ordinance.—An ordinance for street improvement is not open to objection that it improperly delegates power to board of local improvements because it does not set forth in minute detail every particular of improvement and every circumstance of work, a substantial compliance with statute being all that is necessary, and discretion as to details of work being properly left to board of local improvements.—City of East St. Louis v. Vogel, Ill., 114 N. E. 941.

74.——Racing in Streets.—A city is liable for injuries resulting from permitting the use of streets for racing and testing automobiles; such streets not being reasonably safe for ordinary street purposes.—Burnett v. City of Greenville, S. C., 91 S. E. 203.

75.——Street Contractor.—It was no defense to city's action on paving guaranty that the defects developed from operation of street cars,

where the contractor's bid was on a different basis for streets occupied by street car tracks and unoccupied streets.—Davis v. City of Newport News, Va., 91 S. E. 136.

76.——Street Obstruction.—Under a general ordinance requiring temporary removal of poles and wires to allow passage of buildings, franchise to a street car company providing that it shall construct its tracks so as to obstruct the street as little as possible may be construed to require company to temporarily remove its wires for moving of buildings.—State v. Omaha & C. B. St. Ry. Co., Neb., 161 N. W. 170.

77. **Negligence**—Railroad Crossing.—The negligence, if any, of an experienced chauffuer on an automobile operated as a legal transfer in attempting to cross a railroad crossing without looking and listening, was not imputable to a passenger for hire.—Broussard v. Louisiana Western R. Co., La., 73 So. 606.

78. **Physicians and Surgeons**.—Malpractice.—In an action for malpractice, an award of $2,500 in favor of plaintiff, who suffered injuries by reason of defendant's failure to remove gauze packs used in an abdominal operation, held not excessive.—Baer v. Chowning, Minn., 161 N. W. 144.

79.——Experts.—As a general rule, in matters requiring special skill, it is not permissible for laymen, as nonexperts, to set up any artificial standards as to methods of treatment, and this is especially true in surgery.—Snearly v. McCarthy, Ia., 161 N. W. 108.

80.——Negligence.—That surgeon in setting broken bone failed to use x-ray does not establish negligence; as the bone in some cases could properly be set without it.—Snearly v. McCarthy, Ia., 161 N. W. 108.

81. **Principal and Agent**—Consideration. —While a note without consideration, executed in the name of a corporation by one of its officers, and payable to him individually is void against corporation, it is deemed individual obligation of such officer.—Luden v. Enterprise Lumber Co., Ga., 91 S. E. 102.

82.——Evidence.—Where the fact of agency rested in parol or is to be inferred from the conduct of the principal, and there is evidence tending to show the agency, the agent's acts or declarations are admissible in evidence.—Roberts & Son v. Williams, Ala., 73 So. 502.

83. **Prostitution** — Interstate Commerce. —Transportation in interstate commerce of woman though unaccompanied by expectation of pecuniary gain, is condemned by White Slave Traffic Act, June 25, 1910.—Caminetti v. United States, U. S. S. C., 37 Sup. Ct. 192.

84. **Railroads**—Crossing.—In action for damages for blocking farm crossing with cars for 8½ days, plaintiffs could recover damages for melons pulled and partly loaded, and for exposure of oats to rain, and increased expense in carrying water to stock and in working his crop. —Chicago, R. I. & G. Ry. Co. v. Nicholson, Tex., 191 S. W. 167.

85.——Frightening Horses.—A railroad company is liable for injuries to a traveler on the highway from a horse becoming frightened at the unnecessary back-ringing of a signal bell negligently maintained by the railroad company at grade crossing.—Louisville & N. R. Co. v. Comley, Ky., 191 S. W. 96.

86.——Negligence.—Speed of 30 miles an hour upon the boundary of corporate limits and at much used crossing, in view of an ordinance and the company's rules, held to constitute negligence rendering company liable for death of one in automobile killed by the train.—Broussard v. Louisiana Western R. Co., La., 73 So. 606.

87.——Look and Listen.—Ordinary care in approaching a railroad crossing does not require the traveler to stop or look or listen at any particular place, except that he must do so at some place where such precautions would enable him to learn of the approach of a train.—Central Indiana Ry. Co. v. Wishard, Ind., 114 N. E. 970.

88. **Release**—Cancellation.—The cancellation of a release from liability for injury is not justified because of misrepresentations as to employe's physical condition, where he signed the release without reading it, showing that he was not induced to give release through reliance on the representations.—Odrowski v. Swift & Co., Kan., 162 Pac. 268.

89. **Sales**—Estoppel.—Defense of want of consideration is not available in action on notes for balance of price of automobile if evidence shows there was any consideration, no matter how small.—Vreeland v. Murray, Colo., 162 Pac. 148.

90. **Slaves**—Children.—Under Code 1904, § 2227, negroes who before February 27, 1868, lived together under a bona fide agreement as husband and wife, were "married," and their children "legitimate," though he abandoned her before such date.—Francis v. Tazewell, Va., 91 S. E. 202.

91. **Street Railroads**—Burden of Proof.—In action against a street railroad company for injuries resulting from collision with automobile, it is unnecessary for plaintiff to prove allegations of negligence by preponderance of evidence because of presumption of negligence arising by reason of accident.—Murphy v. Georgia Ry. & Power Co., Ga., 91 S. E. 108.

92.——Ordinary Care.—In action against street railway company and taxicab company for injuries received by passenger in taxi, refusal to give instruction requested by railroad company, that taxicab company owed plaintiff the highest degree of care, while railroad company owed him only ordinary care, was not erroneous, where plaintiff did not ask that taxi company's duty be defined.—Virginia Ry. & Power Co. v. Hill, Va., 91 S. E. 194.

93. **Usury**—Tender.—Under Civ Code 1910, § 3444, making it a misdemeanor to charge more than 5 per cent interest per month on loans secured by assignment of salary, a borrower cannot sue to cancel a usurious salary assignment without paying or tendering money received with lawful interest.—Patterson v. Moore, Ga., 91 S. E. 116.

94. **Vendor and Purchaser**—Breach of Contract.—Ordinarily the damages recoverable for breach of a land contract by failing to convey over and above payments made is the difference between the contract price and the market value at the time of the breach, with interest to the date of the judgment.—Lommen v. Danaher, Wis., 161 N. W. 14.

95.——Covenant of Warranty.—Where a judgment goes against a grantee who took under covenants of warranty, grantee may pay adverse claim and set off same against unpaid price.—Fassler v. Streit, Neb., 161 N. W. 172.

96.——Deficiency.—Although sale was in gross and deed conveyed 66 acres, more or less, deficiency of 10 acres held to justify inference of mutual mistake, and entitle purchaser to abatement of price.—Tinsley v. Hearn, Tenn., 191 S. W. 127.

97. **Wills**—Bequest.—An automobile kept in a garage of a residence lot of deceased is not included in a bequest of lot and residence thereon, and all contents.—Succession of Sauvage, La., 73 So. 702.

98.——Defeasible Fee.—A will leaving to testator's wife "all my real estate of whatsoever name or nature, in fee simple, so long as she will be my widow and not marie again," gave the widow a defeasible fee, subject to being divested only by her marriage.—Staack v. Detterding, Ia., 161 N. W. 44.

99.——Jurisdiction.—Where testator, who was domiciled and died in Georgia, had property in Alabama, a decree of court of county where his property was situated, admitting his will to probate, was not affected by action of courts of state of Georgia in admitting to probate another will in a proceeding commenced after the Alabama proceeding, and the attempted ancillary probate of the Georgia instrument was void.—Frederich v. Wilbourne, Ala., 73 So. 442.

100.——Legacy.—Under Civ. Code, arts. 480, 1642, a legacy of a drug store does not include money, rights and credits of concern, and does not render legatee liable for debts contracted in regular course of business.—Succession of Sauvage, La., 73 So. 702.